IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-

VULCAN FORGING CO.,
Petitioner,

v.

DAHLBERG, SIMON, JAYNE, WOOLFENDEN & GAWNE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

The petitioner, Vulcan Forging Co., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Michigan (App. A, *infra*) and the opinion of the Circuit Court for the County of Oakland, Michigan (App. B, *infra*) are not reported.

JURISDICTION

The judgment of the Circuit Court for the County of Oakland, Michigan was entered on August 9, 1972 (App. C, *infra*), and affirmed by the Court of Appeals of the State of Michigan on August 24, 1973. Appli-

cation for rehearing was denied on October 23, 1973. The Supreme Court of the State of Michigan denied leave to appeal on February 21, 1974 (391 Mich. 778), and denied a motion for reconsideration on June 11, 1974. On September 5, 1974, Mr. Justice White extended the time within which to file a petition for certiorari to and including October 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

QUESTION PRESENTED

Whether the judgment of the state court, ordering one corporation to pay a debt owed by another corporation, without evidence in the record to support such liability, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT

This is an action on an express oral contract between two corporations and a law firm whereby the law firm was to perform services in connection with the negotiation and sale of the assets of the two corporations to the Ford Motor Company. On March 22, 1965, Dahlberg, Simon, Jayne, Woolfenden & Gawne [hereinafter "Dahlberg"] was retained by Adolph Meyer, acting on behalf of Vulcan Forging Co. [hereinafter "Vulcan"], petitioner herein, and Venus Die Engineering Co. [hereinafter "Venus"]. Meyer was President of Vulcan. Venus was a separate corporation owned by members of Meyer's family; none of the Venus stock was owned by Vulcan. Dahlberg's total fee was not fixed at the outset, but beginning April 1965 until the sale was consummated, Dahlberg charged monthly retainers of $650 to Vulcan and $150 to Venus. (Def. Exhs. H and I.) On December 29, 1965, the assets of the two corporations were sold to Ford for $2,100,000 plus the value of inventories. Pursuant to a contem-

poraneous agreement between Vulcan and Venus, full payment was to be received initially by Vulcan and subsequently allocated between the two corporations after deducting expenses of the sale, including counsel fees. (Def. Exh. J.) [1]

Shortly before the closing, Dahlberg's fee was established at a meeting between its senior partner and Meyer. The fee was set at $100,000 less $6400, the total amount of retainers previously paid to Dahlberg by the two corporations: $28,000 to be paid at the time of closing in December, and the remainder to be paid after January, 1966.[2] Then, in February, a disagreement developed between the law firm and Meyer, who charged that Dahlberg had not satisfactorily represented Vulcan's interests in the sale to Ford and refused to pay the outstanding balance on the contract.

On November 17, 1969, Dahlberg brought this action in a circuit court of Michigan against Vulcan and Venus seeking, *inter alia*, $65,000 in damages for breach of contract.[3] The sole allegation that Vulcan was responsible for the debt of Venus appeared in a *quantum meruit* count of the complaint, which allegation Venus denied. The trial court dismissed that count, thus re-

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[1] The letter agreement, dated December 13, 1965, provides: "Under the terms of the agreement [Vulcan] will receive payment of the entire basic purchase price and shall hold the same pending allocation between us. . . . This basic purchase price, after deducting general expenses of sale such as counsel fees, shall be allocated between us . . . ." (Def. Exh. J.)

[2] On December 27, 1965, two days before the closing, Dahlberg billed Vulcan and Venus for $81,000. (Def. Exh. H). How this amount was computed was not explained at trial.

[3] The complaint further alleges, *inter alia*, that the unpaid balance of the original fee, $65,000, "is shown on the books of the said *companies* [Vulcan and Venus] as an account payable and was taken by *them* as a deduction on their 1965 income tax returns." (Emphasis added.)

moving the only allegation upon which Vulcan's liability for the debt of Venus could be based. On November 20, 1970, an order was entered dismissing Venus, which had been dissolved more than three years prior to the bringing of the lawsuit. Vulcan, thereafter answered the complaint denying, *inter alia,* that it was liable for that portion of the fee allocable to Venus, a separately owned corporation.

At trial there was no evidence adduced that Vulcan had agreed to pay that portion of the fee allocable to Venus. Counsel for Vulcan raised this point in a motion to dismiss, which the trial court denied as "frivolous."[4]

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[4] At the close of the trial, the following colloquy occurred:

[Counsel for Vulcan]: "The plaintiffs have failed to show what work was performed for Venus. They have failed to show what work was done for Vulcan. Vulcan in no way, your Honor, can be liable for the debts of Venus. There is no joint liability. One corporation cannot be liable for the obligations of another corporation.

"There is no several liability in this case because the plaintiff did not show what services were actually performed for one and what services were actually performed for the other. Vulcan, as I said, cannot be liable for the fees and services charged to Venus * * * Therefore, I move the case be dismissed.

* * *

[Counsel for Dahlberg]: "Your Honor, there has never been any intimation on the part of the defendant that Mr. Meyer did not have authority to bind the corporation of which he was the controlling stockholder.

* * *

"THE COURT: There is no question about that. . . . But at no time, in the Court's recollection, on the record or otherwise was there any question raised that the real party in interest, Mr. Meyer, was not clothed with apparent authority to act for Vulcan, and Vulcan had entered into the contract for services, if contract there was, with Roy Dahlberg.

"So the Court is denying that motion as being frivolous. It was not raised before. It was not pleaded. There is no evidence to that effect . . . ." (Tr. pp. 198-200.)

Thereafter, the court, without findings that Vulcan was liable for the debt of Venus, nonetheless ordered Vulcan to pay the entire amount outstanding on the contract with Dahlberg. (App. C, *infra.*)

On appeal, the Court of Appeals for the State of Michigan affirmed the judgment without commenting on Vulcan's claim, briefed in the appeal, that the circuit court had erred in holding it liable for that portion of the fee allocable to Venus. A request for reconsideration was denied. The Supreme Court for the State of Michigan denied Vulcan leave to appeal and refused a request for reconsideration.

REASON FOR GRANTING THE WRIT

The judgment of the state court ordering Vulcan to pay the debt of another corporation, without evidence in the record to support such liability, violates the Due Process Clause of the Fourteenth Amendment. It is well established that to deprive an individual of his life or liberty in a state criminal prosecution without evidence of the elements of crime is a denial of due process of law. *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Shuttlesworth* v. *Birmingham,* 382 U.S. 87 (1965); *Gregor* v. *Chicago,* 394 U.S. 111 (1969). *See also Washington* v. *United States,* 357 U.S. 348 (1957). This principle has been further applied by this Court to overturn a state court revocation of probation. *Douglas* v. *Buder,* 412 U.S. 430 (1973). The Due Process Clause of the Fourteenth Amendment places property on the same plane as life and liberty in assuring Americans that these interests will not be taken from them except when government "follow[s] a fair process of decision-making." *Fuentes* v. *Shevin,* 407 U.S. 67, 80 (1972).

In the absence of evidence to support such a deprivation, as in this case, "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference" (*id.* at 81) is subordinated to the whims of a governmental authority—in this instance, a judicial authority—a result plainly at odds with the fundamental libertarian purposes of the Fourteenth Amendment. *See Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972).

Here, the services of a law firm were retained to negotiate the sale of the assets of two separate corporations, Vulcan and Venus. Each corporation was billed separately for these services for nine months until the sale was consummated. The corporations acknowledged their separate debts: at the time of the sale they agreed, in effect, to split the fee in the same proportion as they allocated the purchase price (Def. Exh. J), and as alleged in the complaint, they later showed the amount owing Dahlberg on their separate 1965 tax returns. (Complaint, ¶ 12.) More than three years later, when Venus was dissolved, and the statutory limit within which Venus could be sued had passed, Dahlberg sought to recover the remaining fee for both corporations from Vulcan.

The courts of Michigan granted relief with no evidence presented that Vulcan assumed the fee obligation of Venus; indeed, it did so in the face of evidence indicating contrary understandings and actions of the parties. The unstated basis for the court's order appears to have been an implicit presumption that Vulcan, through its President, orally agreed to pay the debt of Venus. Such presumptions are not only contrary to human experience but also contrary to the express

policy of the Statute of Frauds. The wisdom underlying the Statute of Frauds is that persons do not undertake such solemn obligations except in writing, and for that reason such oral contracts are unenforceable. RESTATEMENT OF CONTRACTS § 180 (1932). Entry of the judgment in this case was plainly contrary to the Due Process Clause.

Vulcan seeks redress in this, the court of last resort, and respectfully requests that the judgment below be summarily reversed and that the case be remanded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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